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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MONONGAHELA POWER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,
Respondents,

and

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Intervening Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TROY B. CONNER, JR.
Counsel of Record
ROBERT M. RADER
CONNER & MOORE
1747 Pennsylvania Avenue, N.W.
Suite 1050
Washington, D.C. 20006
(202) 833-3500

Counsel for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTION PRESENTED

Whether the Interstate Commerce Commission may lawfully refuse to investigate a shipper's complaint and conduct a hearing thereupon pursuant to 49 U.S.C. § 11701(b) to determine whether certain demurrage charges are "reasonable" where the Commission has previously authorized the carrier to remit a portion of the charges without determining the reasonableness of the balance.

INDEX

	Page
QUESTION PRESENTED	i
OPINION BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	18
APPENDIX A	1a
APPENDIX B	9a
APPENDIX C	19a
APPENDIX D	25a

CITATIONS

CASES:

Abdallah v. *Abdallah*, 359 F.2d 170 (3d Cir. 1966)	16
Alabama Power Co. v. *United States*, 316 F. Supp. 337 (D.D.C. 1969), *aff'd sub nom. by an equally divided Court, Atlantic City Electric Co.* v. *United States*, 400 U.S. 73 (1970)	14
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974)	17
Alexander Sprunt & Son, Inc. v. *United States*, 281 U.S. 249 (1930)	12
Brimstone R.R. & Canal Co. v. *United States*, 276 U.S. 104 (1928)	14
Bud Antle, Inc. v. *United States*, 593 F.2d 865 (9th Cir. 1979)	15

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Citations Continued

Page

Burlington Northern, Inc. v. *United States*, 549 F.2d 83 (8th Cir. 1977) 14

Chicago, Burlington & Quincy R.R. v. *Edward Hines Lumber Co.*, 320 F. Supp. 194 (N.D. Ill. 1970) ... 6

Chrysler Corp. v. *New York Central R.R.*, 234 I.C.C. 755 (1939) 4, 5

Cincinnati, New Orleans & Texas Pacific Ry. v. *ICC*, 162 U.S. 184 (1896) 14

Dayton-Goose Creek Ry. v. *United States*, 263 U.S. 456 (1924) 15

Detention Charges on Coal from Oklahoma to Missouri, via SLSF, 362 I.C.C. 700 (1980) 5, 9

East Tennessee, Virginia & Georgia Ry. v. *ICC*, 181 U.S. 1 (1901) 11

Eastern-Central Motor Carriers Association v. *United States*, 321 U.S. 194 (1944) 11

Electronic Industries Association v. *United States*, 310 F. Supp. 1286 (D.D.C. 1970), *aff'd*, 401 U.S. 967 (1971) 14

Georgia Public Service Commission v. *United States*, 283 U.S. 765 (1931) 13

ICC v. *Atchison, Topeka & Santa Fe Ry.*, 234 U.S. 294 (1914) 15, 16

ICC v. *Atlantic Coast Line R.*, 383 U.S. 576 (1966) .. 9

ICC v. *Baird*, 194 U.S. 25 (1904) 10

ICC v. *Baltimore & Ohio R.R.*, 145 U.S. 263 (1892) .. 10

ICC v. *Clyde Steamship Co.*, 181 U.S. 29 (1901) 11

ICC v. *Inland Waterways Corp.*, 319 U.S. 671 (1943) .. 14

ICC v. *Stickney*, 215 U.S. 98 (1909) 9

ICC v. *United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912) 10

Illinois Central R.R. v. *ICC*, 206 U.S. 441 (1907) 9

Citations Continued

Page

King v. *United States*, 344 U.S. 254 (1952) 13

Manufacturers Ry. v. *United States*, 246 U.S. 457 (1918) 11

Morton v. *Ruiz*, 415 U.S. 199 (1974) 15

Newport News Shipbuilding & Drydock Co. v. *Director*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979) 16

North Carolina Natural Gas Corp. v. *United States*, 200 F. Supp. 745 (D. Del. 1961) 14

Oklahoma Corporation Commission v. *United States*, 388 F. Supp. 4 (N.D. Okla. 1974) 14

Ormet Corp. v. *Illinois Central R.R.*, 341 I.C.C. 647 (1972) 9

Prince Manufacturing Co. v. *Norfolk & Western Ry.*, 356 I.C.C. 702 (1978) 9

Railroad Commission v. *Chicago, Burlington & Quincy R.R.*, 257 U.S. 563 (1922) 14

Swift & Co. v. *United States*, 343 U.S. 373 (1952) 9

Texas & Pacific Ry. v. *ICC*, 162 U.S. 197 (1896) 9, 11

Turner, Dennis & Lowrey Lumber Co. v. *Chicago, Milwaukee & St. Paul Ry.*, 271 U.S. 259 (1926) 4, 9

United States v. *Chesapeake & Ohio Ry.*, 426 U.S. 500 (1976) 10

United States ex rel. Kansas City Southern Ry. v. *ICC*, 252 U.S. 178 (1920) 10, 16

United States v. *Louisiana*, 290 U.S. 70 (1933) 13

FEDERAL STATUTES:

Interstate Commerce Commission Act, 49 U.S.C. § 10101 *et seq.*:

49 U.S.C. § 10701(a) ..... *passim*

49 U.S.C. § 10750 4

49 U.S.C. § 11701(b) ..... *passim*

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THE BALTIMORE AND OHIO RAILROAD COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Monongahela Power Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 30, 1980.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-8a) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 30, 1980 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTES INVOLVED

Three sections of the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, are relevant to this petition.[1] These provisions are set forth below:

> 49 U.S.C. § 10701(a) [Section 1(5)(b)]: A rate, classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdication of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier must be reasonable. Divisions of joint rates by those carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.
>
> 49 U.S.C. § 10750 [Section 1(6)]: A rail carrier providing transportation subject to the jurisdic-

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[1] In 1978, Congress enacted the provisions of 49 U.S.C. § 10101 *et seq.*, into positive law. *See* Act of October 13, 1978, Pub. L. 95-473, 92 Stat. 1371. As explained in footnote 7, *infra*, no substantive change in the law was effected by the codification. In reproducing the relevant statutory provisions, petitioner has bracketed their former citation in the United States Code for the convenience of the Court.

tion of the Interstate Commerce Commission under subchapter I of chapter 105 of this title shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—

(1) freight car use and distribution; and

(2) maintenance of an adequate supply of freight cars to be available for transportation of property.

49 U.S.C. § 11701(b) [Section 13(1)]: A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title because of the absence of direct damage to the complainant.

STATEMENT OF THE CASE

In the proceeding below, Monongahela Power Company (hereinafter "Monongahela" or "petitioner") sought recovery of demurrage charges [2] resulting from

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[2] Demurrage charges are assessed by carriers upon shippers for the detention of railroad cars beyond the so-called free-time specified in tariffs for loading or unloading (App. A, *infra*,). Demurrage charges consist of compensatory and punitive elements,

unusually severe weather conditions during the winter of 1976-77. The total in demurrage charges initially assessed by respondent Baltimore & Ohio Railroad Company (hereinafter "B & O") pursuant to the provisions of the applicable tariff was $1,104,010.

In consideration of the severe weather emergency at that time, 17 railroads (and ultimately 3 others) petitioned the Interstate Commerce Commission (hereinafter "ICC" or "Commission") for approval of a demurrage relief proposal. By order in ICC Docket No. 36574 dated August 3, 1977 (hereinafter "No. 36574"), Division 2 of the ICC authorized the petitioning carriers to waive a portion of the applicable demurrage charges for the specified period (App. B, *infra*, 9a-18a). Division 2, however, did not consider the appropriateness of eliminating *all* demurrage charges. The petition submitted by the railroads made no reference to the provisions of 49 U.S.C. § 11701(b) for recovering unreasonable demurrage charges, and did not state that shippers would be precluded from seeking to recover the balance of any charge not waived. Most important, Division 2 made no finding in No. 36574 that the adjusted demurrage charges were in fact "reasonable." It merely authorized the railroads to effect a partial waiver.

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as explained by this Court in *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 271 U.S. 259, 262 (1926):

> All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention.

See also Chrysler Corp. v. *New York Central R.R.*, 234 I.C.C. 755, 759 (1939). *See generally* 49 U.S.C. § 10750.

Based upon No. 36574, Monongahela applied for and received a refund in the amount of $521,500 from B & O. In its application, it notified both B & O and the ICC that it would seek relief from the unwaived demurrage charges through the Commission's formal complaint procedures and reserved all rights accordingly.

By a verified complaint filed on April 13, 1978 with the ICC, Monongahela challenged the reasonableness of the remaining demurrage charges, claiming that no charge at all should have been assessed in light of the extraordinarily harsh winter conditions.[3] Monongahela

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[3] Essentially, Monongahela sought to recover the balance on the theory of *vis major*. There was a substantial time during the period in which demurrage was charged, one of the coldest recorded winters in meteorological history in that area of the country, when no unloading at all was possible because of severe freezing. Alternatively, Monongahela sought the elimination of the penalty portion of the demurrage charges on the theory that it had exercised due diligence in attempting to unload the cars in their frozen state and returning them to B & O as soon as possible. The basis for such a recovery has been restated by the Commission in a recent decision involving the reasonableness of demurrage charges:

> When demurrage charges penalize a shipper or consignee who is powerless to release cars or to avoid or abate detention of cars because of circumstances beyond its control, they do not accomplish their purpose. In numerous instances, penalty charges have been found unreasonable and remitted upon a showing by the shipper or consignee that it was not the proximate cause of the detention and that it exercised due diligence in releasing or attempting to release the railroad equipment. In applying the due diligence standard, the focus should be on what is reasonable under the circumstances.

Detention Charges on Coal from Oklahoma to Missouri, via SLSF, 362 I.C.C. 700, 711 (1980). The ICC expressly recognized *vis major* as a basis for reparation of demurrage charges in *Chrysler Corp.* v. *New York Central R.R.*, 234 I.C.C. 755, 758-59 (1939). It has been held that a shipper will be excused from the payment of

relied upon specific language in the order entered by Division 2 authorizing the partial remittance. The order states in part:

> The extension of the proposal to demurrage charges not named in the involved tariff *or in an amount greater than that specified* has not been substantiated. *However, the approval of the instant proposal does not prejudice the filing of such proposals by the carriers or the filing of additional claims for greater relief by the shippers.* Furthermore, shippers or receivers will have the option of applying for the claim under the involved proposal, filing a claim under the proposal and in the event no binding settlement is made subsequently seeking relief from alleged unjust and unreasonable demurrage charges under the Commission's regular procedures, or by initially seeking relief from the Commission under its regular procedures.[4]

Further, in apparent recognition of the existing statutory remedy available to shippers, Division 2 added the following provision at the end of the approved proposal:

> NOTE: Shippers and receivers can elect to file a claim under this proposal or a formal docket with the Interstate Commerce Commission. *The filing of a claim under this proposal also does not prevent the shipper from seeking additional relief from the Commission.* In addition, special-docket applications can be filed by the carrier.[5]

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all demurrage charges incurred as a result of inclement winter weather. *Chicago, Burlington & Quincy R.R.* v. *Edward Hines Lumber Co.*, 320 F.Supp. 194 (N.D. Ill. 1970).

[4] App. B, *infra*, 12a (emphasis added) (footnotes omitted).

[5] App. B, *infra*, 18a (emphasis added).

Nonetheless, ICC Review Board No. 4 declined to consider the merits of petitioner's alternative claims for relief and dismissed petitioner's complaint on October 27, 1978, holding that petitioner was estopped from seeking further relief from the Commission because it had accepted the refund of the adjusted demurrage charge authorized by Division 2 in No. 36574 (App. C, *infra,* 19a-23a). Specifically, Division 2 made no determination as to whether the B & O demurrage charge or any part thereof was in fact reasonable. By decision dated August 28, 1979, the Commission affirmed and adopted as its own the conclusions and findings of Review Board No. 4 (App. D, *infra,* 25a-27a). In essence, the Commission held:

> . . . No. 36574 excludes the possibility of first obtaining relief under its special expedited procedures and then seeking additional reparations through a complaint to the Commission. Complainant elected its remedy, which constituted a binding settlement since relief was accorded to the maximum extent permitted by No. 36574.[6]

On October 11, 1979, Monongahela filed a petition for review in the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 2321. By decision dated October 30, 1980, the court of appeals, Judge Widener dissenting, affirmed the ICC decision on the grounds that the Commission's interpretation of the Division 2 order in No. 36574 was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (App. A, *infra,* 4a, 6a). In substance, the court of appeals majority determined that the ICC had not acted arbitrarily in construing its order so as to

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[6] App. D, *infra,* 26a.

require a shipper seeking a refund of excessive demurrage charges to elect between the separate remedies afforded by No. 36574 and the complaint procedures for an investigation and full hearing under 49 U.S.C. § 11701(b). The court did not discuss whether the ICC was required to make a statutory determination that the unrefunded B & O demurrage charge or any part thereof was "reasonable" within the meaning of 49 U.S.C. § 10701(a). The dissent stated that the majority had created an unnecessary conflict in the terms of the order by ignoring the plain language upon which Monongahela was entitled to rely in pursuing additional claims for relief under the ordinary complaint procedure.

REASONS FOR GRANTING THE PETITION

The decision by the court of appeals represents a serious misconstruction of the Interstate Commerce Act ("Act"), which secures to shippers an absolute right to an investigation and a full hearing before the ICC as to whether a particular rate is "reasonable,"[7] except where the Commission determines that a particular complaint does not state reasonable grounds for investigation and action.[8] The decision below is a clear departure from the unbroken line of precedents of this Court and the lower federal courts which sup-

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[7] In 1978, Congress enacted the recodification of the Interstate Commerce Act into positive law as 49 U.S.C. § 10101 *et seq.* As explained in H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 13 (1978), the term "reasonable" was substituted in place of "just and reasonable" throughout the Act for clarity, consistency and to conform to modern usage. Specifically, the report stated: "The change does not affect the substantive law."

[8] 49 U.S.C. § 11701(b).

port the right of shippers like Monongahela to contest rates charged by carriers[9] as unreasonable or otherwise illegal and therefore void. *E.g., ICC* v. *Atlantic Coast Line R.*, 383 U.S. 576 (1966); *Swift & Co.* v. *United States*, 343 U.S. 373 (1952); *ICC* v. *Stickney*, 215 U.S. 98 (1909); *Illinois Central R.R.* v. *ICC*, 206 U.S. 441 (1907); *Texas & Pacific Ry.* v. *ICC*, 162 U.S. 197 (1896). In each of these cases, this Court has recognized the primacy of the ICC in determining the reasonableness or legality of rates charged by carriers and, toward that end, has held that shippers must initially contest such charges before the Commission pursuant to the complaint and hearing procedures in 49 U.S.C. § 11701(b), and has also restricted judicial review in deference to the Commission's factual determination.

The statutory mandate of the ICC to investigate and hear complaints of unreasonable rates is at the very heart of the Act. The provisions of 49 U.S.C. § 10701(a) "require the Commission to ensure that the

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[9] The ICC took the position below that demurrage charges are not "rates" within the meaning of 49 U.S.C. § 10701(a). To the contrary, the Commission has again recently reaffirmed the position it has consistently taken in administrative proceedings that demurrage charges are indeed "rates" reviewable for their reasonableness. *Detention Charges on Coal from Oklahoma to Missouri, via SLSF*, 362 I.C.C. 700, 708 (1980). *See also Prince Manufacturing Co.* v. *Norfolk & Western Ry.*, 356 I.C.C. 702 (1978); *Ormet Corp.* v. *Illinois Central R.R.*, 341 I.C.C. 647 (1972). This Court upheld the jurisdiction of the ICC to determine the reasonableness of demurrage charges in *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry.*, 271 U.S. 259 (1926). Of course, whether demurrage is deemed a "rate" or a "rule" is irrelevant, since both rates and rules must be "reasonable" to be lawful. *See* 49 U.S.C. § 10701(a).

rate imposed on the traveling or the shipping public will support both an economically sound and efficient rail transportation system." *United States* v. *Chesapeake & Ohio Ry.*, 426 U.S. 500, 510-11 (1976). From the earliest days of the statute, it was recognized that securing reasonable charges for transportation to shippers has been one of the "principle objects" of the Act. *ICC* v. *Baltimore & Ohio R.R.*, 145 U.S. 263, 276 (1892).

The prior decisions of this Court requiring exhaustion of ICC remedies and limiting the scope of judicial review reflect a strong congressional mandate for the Commission to exercise its important fact finding function as to the reasonableness of rates without fail. In *ICC* v. *Baird*, 194 U.S. 25, 39 (1904), this Court concluded that under the "mandatory requirement" of 49 U.S.C. § 11701(b), "no alternative is left the Commission but to investigate the complaint, if it presents matter within the purview of the act and the powers granted to the Commission." If the ICC should "absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion," *ICC* v. *United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474, 484 (1912), and this Court will require the Commission "to discharge duties which the statute exacts." *United States ex rel. Kansas City Southern Ry.* v. *ICC*, 252 U.S. 178, 187 (1920).

In the instant case, the ICC has refused to exercise its nondiscretionary duty to investigate and hear Monongahela's complaint that the B & O demurrage charges were unreasonable under the severe winter circumstances. Nor could the ICC be said to have fulfilled its duties to Monongahela under 49 U.S.C. § 11701 (b) merely by authorizing the railroads, at their re-

quest, to remit a portion of the demurrage charges. Thus, the Commission and the court below seriously erred in holding that the partial, voluntary remittance by B & O and other affected railroads, in an amount determined unilaterally by the carriers excused the Commission from conducting its own independent, factual inquiry. To determine the legality of rates in any case "requires an investigation into the facts." *Texas & Pacific Ry.* v. *ICC,* 162 U.S. 197, 219 (1896). Where the Commission fails to make an adequate inquiry, this Court has granted review to correct the error and remand for a hearing. *E.g., Eastern-Central Motor Carriers Association* v. *United States,* 321 U.S. 194 (1944); *ICC* v. *Clyde Steamship Co.,* 181 U.S. 29 (1901); *East Tennessee, Virginia & Georgia Ry.* v. *ICC,* 181 U.S. 1 (1901). Specifically, a determination by the ICC that a carrier's rate is reasonable will be overturned if "unsupported by evidence . . . [or] made without a hearing." *Manufacturers Ry.* v. *United States,* 246 U.S. 457, 481 (1918).

This case necessitates a restatement of these basic principles. The court below improperly disregarded the plain language of 49 U.S.C. § 11701(b) and the cases discussed above, which afford shippers like Monongahela an unqualified right to an investigation and hearing where there is reason to believe that a carrier may have charged an unreasonable rate in violation of 49 U.S.C. § 10701(a).[10] In our view, the court of ap-

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[10] At no time in the proceeding below did the ICC take the position that Monongahela's complaint failed to state reasonable grounds for investigation. Indeed, its approval of a partial remittance of demurrage charges by the railroads in No. 36574 simply renders the point incontrovertible.

Division 2 stated in its order: "The record in this proceeding and the general knowledge of the extreme and unusual weather

peals so narrowly focused on the language in No. 36574 that it altogether ignored the larger issue of a shipper's statutory right to an investigation and hearing under 49 U.S.C. § 11701(b). In effect, the court held that the ICC may effectively extinguish the statutory right of a shipper to an investigation and a hearing by approving a carrier's voluntary remittance of a portion of an overcharge. That holding is squarely contrary to the rulings of this Court under the Act.

In approving the petitioning railroads' request in this case for approval of reduced demurrage for a designated period throughout the east coast of the United States, the ICC performed the same kind of regulatory function as in a general revenue case approving an overall rate increase for a particular area of the country. In such circumstances, it has been uniformly held that a general revenue order is not a determination by the Commission that the rate imposed is reasonable as to particular shippers and does not thereby preclude shippers from requesting a hearing and investigation.

Thus, in *Alexander Sprunt & Son, Inc.* v. *United States,* 281 U.S. 249 (1930), certain carriers had been unable to devise a rate to eliminate discrimination against local traffic previously found by the ICC to be discriminatory. After petitioning the ICC for assistance, they voluntarily adopted the rate suggested by the

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conditions and shortages of energy support the approval of the petitioners' proposal to waive portions of the arbitrary demurrage charge" (App. B, *infra,* 11a). Of course, this generalized conclusion was sufficient to support an across-the-board remittance, but did not constitute a finding that the unwaived portion constituted a reasonable charge as to any given shipper, such as Monongahela.

ICC. The shippers complained that the Commission's action in suggesting the new rate violated their right to a hearing and findings on reasonableness under what is now 49 U.S.C. § 11701(b). In rejecting this contention, this Court clearly preserved the shippers' hearing rights:

> In prescribing the rate, the Commission in no way prejudiced any pre-existing rights or remedies of the [shippers]. Any question as to the reasonableness of the level of the rate was expressly left open by the Commission.[7] It did not prescribe any rate as the minimum. If [the shippers] are aggrieved by the level of the new rates, they still have their remedy before the Commission under §§ 13 and 15 of the Act.[11]

Similarly, in *United States* v. *Louisiana,* 290 U.S. 70, 77 (1933), this Court sustained a rate order, similar in breadth to that in No. 36574, against allegations that no finding of reasonableness had been made as to individual shippers. The Court observed that the order was "accompanied by suitable reservation of the rights of all interested parties to secure modification of any particular rate which, when challenged, is found to be unjust or unreasonable." *See also King* v. *United States,* 344 U.S. 254, 275-76 (1952); *Georgia Public Service Commission* v. *United States,* 283 U.S. 765, 772

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[11] 281 U.S. at 259. In footnote 7, the Court noted that the ICC had said, with reference to the rate, that its "finding is without prejudice to further inquiry into the reasonableness of the above rates in connection with other cases now pending." This is essentially the same language contained in Appendix B and the Note appended to No. 36574, which stated that the ICC's approval of the carriers' proposal in No. 36574 does not prejudice the right of shippers in filing *additional* claims for *greater* relief.

(1931); *Railroad Commission* v. *Chicago, Burlington & Quincy R.R.*, 257 U.S. 563, 579 (1922).[12]

Accordingly, the ICC's authorization in No. 36574 was not an approval of prescribed demurrage charges based upon an explicit finding of reasonableness as to Monongahela and, therefore, "they stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations." [13] To have deemed the demurrage charges fixed by the carriers as conclusively reasonable without a hearing was an illegal prejudgment by the ICC.

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[12] The lower courts have likewise held that merely permitting carriers to file new tariffs based upon general revenue orders is not the equivalent of an ICC determination as to the reasonableness of the rate and does not prevent a shipper from challenging a particular rate adjustment. *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D.D.C. 1969), *aff'd sub nom. by an equally divided Court, Atlantic City Electric Co.* v. *United States*, 400 U.S. 73 (1970); *Electronic Industries Association* v. *United States*, 310 F. Supp. 1286 (D.D.C. 1970), *aff'd*, 401 U.S. 967 (1971); *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 749 n.11 (D. Del. 1961). The same is true even where the ICC acts to prescribe rather than merely authorize the rate change. *Oklahoma Corporation Commission* v. *United States*, 388 F. Supp. 4 (N.D. Okla. 1974).

The same rule has been applied to the carrier's right to seek a hearing on the reasonableness of the division of joint rates. In *Brimstone R.R. & Canal Co.* v. *United States*, 276 U.S. 104, 122-23 (1928), this Court rejected an argument by a carrier that the modified division of a joint rate should be applied retroactively because it had been implemented by an ICC order and therefore established pursuant to the requisite finding of reasonableness.

[13] *ICC* v. *Inland Waterways Corp.*, 319 U.S. 671, 687 (1943). Conversely, the ICC may not prescribe a rate absent an express determination that it is reasonable. *Burlington Northern, Inc.* v. *United States*, 549 F.2d 83, 87 (8th Cir. 1977).

Cincinnati, New Orleans & Texas Pacific Ry. v. *ICC*, 162 U.S. 184, 196-97 (1896).

In denying Monongahela the right to a hearing, the court of appeals gave no weight to the important statutory purpose of keeping carrier rates reasonable. The restriction of carriers to only reasonable charges permeates the Act.[14] Thus, if Monongahela is correct that the emergency storm conditions prevented any earlier release of the cars, then allowance of demurrage charges, or at least the penalty portion, would be unreasonable and fail to serve any valid purpose under the Act. Further, the court below did not construe No. 36574 consistently with the clear congressional purpose in providing a shipper with an unqualified remedy for truly unreasonable charges by way of a hearing and formal findings under 49 U.S.C. § 11701(b).

Instead of construing the reasonableness and hearing provisions of 49 U.S.C. §§ 10701(a) and 11701(b) consistently with their evident purpose, *Morton* v. *Ruiz*,

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[14] A carrier "is not entitled as a constitutional right to more than a fair net operating income upon the value of its properties" and a carrier "must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends but that his obligation limits him to only fair or reasonable profit." *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 481 (1924). Specifically as to rates, "an additional charge [is] not justified if additional service was not in fact rendered." *ICC* v. *Atchison, Topeka & Santa Fe Ry.*, 234 U.S. 294, 310 (1914). Accordingly, the statute has been construed to prevent "unjustifiable windfall" to carriers. *Bud Antle, Inc.* v. *United States*, 593 F.2d 865, 875 (9th Cir. 1979). In this instance, the allowance of demurrage to B & O notwithstanding the blamelessness of Monongahela in being unable to release the carrier's railroad cars more promptly under the severe winter conditions would result in a true windfall to B & O.

415 U.S. 199, 237 (1974), it simply construed the language of the order in No. 36574 to eliminate further relief under those provisions where a shipper has availed itself of a partial remittance by the carriers. As discussed *supra*, however, the ICC could not so extinguish Monongahela's rights to an investigation and a hearing; the ICC itself must formally determine the reasonableness of any demurrage adjustment upon request, which it indisputably did not do in this case.

The only justification offered by the ICC in dismissing Monongahela's complaint was that "[c]omplainant elected its remedy, which constituted a binding settlement." [15] Whether viewed as an estoppel [16] or election of remedies [17] argument, the court of appeals clearly

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[15] App. D, *infra*, 26a. In reviewing the Commission's legal position, the court of appeals utilized an improper standard of review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), in concluding that "[a]n examination of the proposal [in No. 36574] as a whole supports the Review Board's conclusions" (App. A, *infra*, 5a). The claim presented to the court required in the first instance a declaration of the legal duty of the ICC under the Act to proceed to an investigation and hearing upon petitioner's complaint. The court should have decided this issue for itself as a matter of law without deference to the views expressed below in the administrative proceeding by the ICC. *United States ex rel. Kansas City Southern Ry.* v. *ICC*, 252 U.S. 178 (1920).

[16] A shipper's consent to a special rate does not estop it from contesting the rate before the ICC. *ICC* v. *Atchison, Topeka & Santa Fe Ry.*, 234 U.S. 294, 312-13 (1914).

[17] The doctrine of election of remedies is inapposite here because the two available remedies, acceptance of a partial remittance under No. 36574 and a determination that the balance is an unreasonable charge, are not inconsistent with each other. *See, e.g., Newport News Shipbuilding & Drydock Co.* v. *Director*, 583 F.2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Abdallah*

erred in denying Monongahela its statutory hearing on the basis of language in No. 36574 that was at best ambiguous.

Whatever the legal theory, the court of appeals dissent accurately observed that the plain language of No. 36574 permitted a shipper to seek *additional* relief from the ICC following a reduction of demurrage charges by the carrier. No. 36574 expressly provided:

> However, the approval of the instant proposal does not prejudice the filing of such proposals by the carriers or the filing of *additional claims for greater relief* by the shippers.[18]

As the dissent reasoned, the majority's parsing of the language in No. 36574 unnecessarily created a conflict in its terms, whereas "no reason is given or exists in the record to hunt out a conflict between the order and its Appendix when none exists facially" (App. A, *infra,* 8a). The dissent correctly stated that Monongahela was entitled to rely upon this plain language and that there is absolutely no inconsistency or inequity in a shipper's acceptance of a voluntary remittance of an admitted overcharge by a carrier and its later request for a hearing as to the reasonableness of the

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v. *Abdallah*, 359 F.2d 170 (3d Cir. 1966). In general, remedies for the same injury may coexist if one "was designed to supplement, rather than supplant" the other and where election is not "required by the possibility of unjust enrichment through duplicative recoveries." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48, 51 n. 14 (1974).

[18] App. B, *infra,* 12a (emphasis added). Further, the Note to Appendix B of No. 36574 likewise stated: "The filing of a claim under this proposal also does not prevent the shipper from seeking additional relief from the Commission" (App. B, *infra,* 18a).

adjusted charge. In order to provide its ratepayers with immediate relief, Monongahela had every incentive to obtain a prompt reduction of demurrage charges subject to subsequent proof that would entitle it to a fuller remittance.

CONCLUSION

Review by this Court is warranted in order to correct this serious misconstruction of the mandatory investigation and hearing provisions of the Interstate Commerce Act, 49 U.S.C. § 11701(b). A writ of certiorari should therefore issue to review the judgment and opinion of the Fourth Circuit Court of Appeals.

Respectfully submitted,

TROY B. CONNER, JR.
Counsel of Record
ROBERT M. RADER
CONNER & MOORE
1747 Pennsylvania Avenue, N.W.
Suite 1050
Washington, D.C. 20006
(202) 833-3500

Counsel for Petitioner

Dated:

JAN 26 1981

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1662

MONONGAHELA POWER COMPANY, a public utility,
Petitioner,

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,
Respondents.

BALTIMORE & OHIO RAILROAD COMPANY,
Intervenor.

On Petition for Review of an Order of the
Interstate Commerce Commission.

Argued: June 5, 1980 Decided: October 30, 1980

Before BRYAN, Senior Circuit Judge, WIDENER and HALL, Circuit Judges.

Troy B. Conner, Jr. (Donald J. Balsley, Jr., Conner, Moore and Corber on brief) for Petitioner; Sidney L. Strickland, Jr., Interstate Commerce Commission (Sanford M. Litvack, Special Assistant to the Attorney General; Barry Grossman, Chief, Appellate Section, Antitrust Section, J. Mark Manner, Dept. of Justice; Richard A. Allen, General Counsel, Henri F. Rush, Associate General Counsel, Interstate Commerce Commission on brief) for Respondent; Nan R. Jacobs for Intervenor.

Albert V. Bryan, Senior Circuit Judge:

Monongahela Power Company (the Company) appeals the dismissal by the Interstate Commerce Commission

(ICC) of its complaint, brought under 49 U.S.C. § 11701(b),[1] challenging the lawfulness of demurrage[2] charged by the Baltimore and Ohio Railroad Company (B&O) (an intervenor) on coal cars detained at the Company's Harrison, West Virginia power station during a portion of the harsh winter of 1976-1977.[3] *Monongahela Power Company* v. *The Baltimore and Ohio Railroad Company,* I.C.C. No. 36918 (Division 2, Aug. 21, 1979). We affirm.

During this period, coal shipped to the Company's Harrison power station by B&O arrived frozen and required thawing prior to unloading. This problem was common to many other railroads and shippers. From late December through mid-March it caused unloading delays of such severity that seventeen affected railroads proposed to the ICC that it authorize them "to waive portions of the arbitrary demurrage charge." The proposal, with certain modifications, was adopted by the Commission. *Petition of Railroads Seeking Authorization to Waive Demurrage Charges Caused by Severe Winter Weather,* I.C.C. No. 36574 (Division 2, Aug. 3, 1977) ("the proposal" or "No. 36574"). As pertinent here, it stipulated that

> shippers or receivers will have the option of [1] applying for the claim under the involved proposal, [2]

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[1] During the course of this dispute Congress revised and recodified the Interstate Commerce Act, enacting it as Subtitle IV of Title 49 of the United States Code. Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 (codified at 49 U.S.C. § 10101 *et seq.*). The Company's complaint proceeded under 49 U.S.C. § 13(1), the relevant language of which was recodified in 49 U.S.C. § 11701. Except as noted, all references will be to the Act as recodified.

[2] Demurrage is the charge imposed upon shippers and receivers for the detention of freight cars beyond the free time for loading and unloading.

[3] The Company also raised the same question regarding its Willow Island, West Virginia power station but does not pursue the issue on appeal.

> filing a claim under the proposal and in the event no binding settlement is made subsequently seeking relief from alleged unjust and unreasonable demurrage charges under the Commission's regular procedures, or [3] by initially seeking relief from the Commission under its regular procedures.

Id. (numerals supplied). The proposal covered the period December 28, 1976 through March 15, 1977.

Monongahela embraced the measure. The B&O demurrage charges had run to $1,104,010 initially. Under the Commission's proposal, however, the Company effectuated a settlement with B&O whereby the charges were reduced to $582,510. B&O refunded $521,500, the difference between the original and the adjusted demurrage for the months covered.

After receiving the refund from B&O, Monongahela filed its complaint seeking to recover the remainder of the demurrage initially charged at the Harrison station from December 29, 1976 through March 5, 1977. In the alternative, it sought reparation of the penalty portion[4] of the demurrage charged during the same period. The basis of the claim was that the demurrage charges ultimately collected by B&O were unjust and unreasonable. This premise in turn rested on the assertion that the detention of the cars was the result of *vis major,* and thus not blamable on the Company.

ICC Review Board Number 4 dismissed the complaint, finding that "[a]s to shipments to the Harrison power station, the complaint is barred by the prior binding settlement between [the Company and B&O]". *Monongahela Power Company* v. *The Baltimore and Ohio Railroad Company,*

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[4] "Penalty portion," as used here, refers to that portion of the demurrage charge exceeding the sum of per diem, administrative and other expenses incurred by the delivering railroad.

I.C.C. No. 36918 (Review Board Number 4, Oct. 27, 1978). It reasoned that "since complainant has settled its claim with defendant *under the procedures adopted in No. 36574* . . . it is estopped from seeking further relief from the Commission." *Id.* (accent added.). The Commission affirmed the Review Board's decision and dismissed the complaint. *Monongahela Power Company* v. *The Baltimore and Ohio Railroad Company,* I.C.C. No. 36918 (Division 2, Aug. 21, 1979).

The Company then filed with this court a petition for review of the ICC decision, pursuant to 28 U.S.C. §§ 2321 and 2342. The scope of our review is narrow: we must ascertain whether the Commission's interpretation of order No. 36574,[5] the basis for its dismissal of the Company's complaint, is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706 (2)(A). We think it is not.

This conclusion flows from our examination of the Commission's deliberations in this matter. Review Board Number 4 correctly observed that "[t]he question is not whether blanket relief and subsequent additional reparations are mutually exclusive, per se, but whether the order in No. 36574 prohibits the granting of additional reparations." Plainly No. 36574 was a tender of orderly *optional* elections available to shippers and carriers. The use of the article "or" explicitly indicates that the shipper could choose only one of the alternatives. The Company could file a claim under the proposal and reach a binding settlement with B&O. It could file a claim under the proposal and then, should it fail to reach a settlement with B&O, seek relief through the Commission's regular procedures. Finally, under the last option, it was free at the very outset

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[5] As no chalenge to No. 36574 itself was mounted by the Company within the 60-day period mandated by 28 U.S.C. § 2344, we consider only the correctness of the Commission's interpretation of that order.

to eschew the limitations of the proposal by seeking relief from the Commission under its regular procedures. Although the Company pursued the first option and settled with B&O, it now rejects the consequences of its choice within the framework established by No. 36574.

In support of its position, the Company points to Appendix B of No. 36574, which summarizes the terms of the approved proposal. At the end appears the following addendum:

> NOTE: Shippers and receivers can elect to file a claim under this proposal or a formal docket with the Interstate Commerce Commission. The filing of a claim under this proposal also does not prevent the shipper from seeking additional relief from the Commission. In addition, special-docket applications can be filed by the carrier.

The Company argues that the second sentence of the "NOTE" permits it to file a claim under the proposal, to receive satisfaction of that claim, and subsequently to seek additional relief from the Commission. Review Board Number 4 rejected this reading:

> We believe that . . . reliance on this sentence out of context is misplaced. The additional relief contemplated can only refer back to the three options detailed at sheet 3 of the order, specifically to the situation where no binding settlement was reached for certain car-days. The first sentence of the "NOTE" indicates that claims could be made under the special procedures or the Commission's regular procedures, but not both, and the second sentence merely modifies that to account for the contingency of a claim under the special procedures, being denied. There is no inconsistency.

An examination of the proposal as a whole supports the Review Board's conclusions. It should be recalled that

Appendix B merely summarizes, but does not modify, the terms that are discussed and approved in the body of No. 36574. The Company's construction would mean that the Commission, despite its deliberation and care in framing the proposal, determined to wipe out the whole of it with the second sentence of the "NOTE". We cannot accept such an interpretation.

In rejecting the Company's administrative appeal, the Commission adopted as its own statement of facts, conclusions, and findings of Review Board Number 4:

> The Review Board held, and we are in agreement, that No. 36574 excludes the possibility of first obtaining relief under its special expedited procedures and then seeking additional reparations through a complaint to the Commission. Complainant elected its remedy, which constituted a binding settlement since relief was accorded to the maximum extent permitted by No. 36574.

As our inquiry convinces us that the Commission's conclusions are not "arbitrary, capricious, and [*sic*] abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), we decline to disturb them.

Affirmed.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent because I believe that the plain language of the order involved allows Monongahela Power Company to seek further relief from the Interstate Commerce Commission.

The Note to Appendix B of Order 36574 states:

> Shippers and receivers can elect to file a claim under this proposal or a formal docket with the Interstate Commerce Commission. *The filing of a claim under this proposal also does not prevent the shipper from seeking additional relief from the Commission.* In addition, special-docket applications can be filed by the carrier. (Italics added.)

That Note thus provides in terms that a shipper can seek *additional* relief from the ICC. Such language clearly controverts the argument that Order No. 36574 establishes an exclusive election of remedies available to shippers like Monongahela.

The majority accepts the ICC's conclusion that the above quoted note refers only to the filings under Order No. 36574 in which no settlement is reached. The ICC bases its conclusion of [*sic*] that part of the Order that sets out three methods of procedure available to shippers and receivers: (1) apply for a claim under the Order; (2) apply for a claim under the Order and if no settlement is reached then seek relief under regular procedures from the ICC; or (3) initially seek relief under regular procedures from the ICC.

The ICC and the majority, however, do not take any account of the preceding sentence of the order itself, not Appendix B which the majority characterizes as a summary. That sentence states:

> "However, the approval of the instant proposal [by the ICC in Order No. 36574] does not prejudice . . . the

filing of *additional* claims for greater relief by the shippers." (Italics added.)

Although Appendix B to the order is in fact a summary, as the majority notes, overturning its plain meaning I think is insufficient for that reason. Monongahela I think was entitled to rely on the order and on its plain construction by the ICC in Appendix B.

It is self-evident that giving Monongahela the option of how to proceed initially is not inconsistent with giving it the right to partially settle its claim and then litigate the balance. While the majority construction does make Appendix B and the order inconsistent with each other, a construction I suggest is not favored as well as not reasonable as I have demonstrated above, no reason is given or exists in the record to hunt out a conflict between the order and its Appendix when none exists facially.

I would thus vacate the ICC's dismissal of Monongahela's complaint and require further proceedings.

APPENDIX B

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 3rd day of August, 1977.

No. 36574

Petition of Railroads Seeking Authorization to Waive Demurrage Charges Caused by Severe Winter Weather

Last winter, severe weather and fuel shortages affected certain areas of the country. Because of these adverse conditions, shippers and consignees were allegedly unable to load or unload railroad cars, industries were closed down, and railroad service in certain areas was curtailed. The National Industrial Traffic League (NITL), in late January 1977, initiated discussions with the Operating-Transportation Division, Operations of Maintenance Department, Association of American Railroads, with the objective of preventing the imposition of a portion of demurrage charges on railroad cars detained because of these unusual circumstances. As a result of these discussions, the 17 petitioner railroads (see Appendix A), all of which are parties to Freight Tariff 4-J, *Car Demurrage Rules and Charges, et al.*, J. F. Doyle, Agent, I.C.C. H-59, in their petition filed April 28, 1977, submitted the following proposal to the Commission for approval:

1. Only those shippers and receivers directly affected by the weather disability or fuel shortage can claim demurrage relief and for this emergency only;
2. Each shipper or receiver must pay his demurrage as rendered and then file for reclaim;
3. Each shipper or receiver must file individual claims at each location supported by justification, i.e., dates and reasons;

4. The claims will be processed informally, but will reuire ICC approval on each individual claim the exact procedure to be determined;

5. The relief requested due to this emergency will be limited to demurrage subject to the 4-series tariff rules;

6. Adjustments for demurrage subject to other than the 4-series tariff will be handled separately, i.e., unit trains, volume shipments, coal, etc.;

7. With respect to the 4-series tariff, after the expiration of free time and the four $10 debit days, the penalty rate of $20 will be reduced to $10 per day and the penalty rate of $30 will be reduced to $15 per day thereafter; and

8. Fuel shortage relief will be applicable as follows: allowance will be given for any cars on hand at time such interference began, but would not apply to inbound cars forwarded four days after the beginning of such interference.

During the involved period, demurrage charges, after the expiration of free-time, would have otherwise accrued at the rate of $10 per day for the first 4 days, $20 per day for each of the next 2 days, and $30 per day thereafter. According to petitioners, the $20 and $30 charges in the tariff have been considered in the nature of penalty charges.[1] These charges, it is argued, should not be imposed upon shippers and receivers in the areas affected by the extreme and unusual weather conditions or fuel shortages, if these conditions prevented the loading or unloading of cars. In addi-

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[1] It is noted that in Ex Parte No. 289, *Remittance of Demurrage Charges of Common Carriers of Property By Rail*, 353 I.C.C. 567 (1977), a $10 demurrage charge was generally sufficient to cover per diem, administrative and other expenses incurred by the delivering road.

tion, to facilitate the instant relief from these penalty charges, it is requested that the claim under the proposal be filed with the carrier within 90 days after the date of service of the Commission's order approving the proposal.

NITL in its reply filed May 9, 1977, supports the proposal, however, it contends that it should be modified to specify the emergency period when the reclaim will apply and that it should be extended to include claims for additional demurrage charges on trainload, unit trains and multiple car movements. NITL also requests that the order entered by the Commission indicate that other railroads will be granted leave to participate in the proposal upon notifying the Commission in writing.

Republic Steel Corporation, in its reply filed May 18, 1977, supports the concept of the proposal yet, it objects to certain of its procedures and the limited nature of the relief proposed. It suggests that (1) the Commission's order specify that the procedures and standards specified in the proposal are not exclusive; (2) a time period defining the period of the emergency conditions should be given; (3) the entire demurrage charge should be reclaimed; and (4) prepayment of the demurrage charges should not be required as a prerequisite to filing a claim.[2] Eastern Associated Coal Corp., in its reply filed July 5, 1977, requests that the emergency period should include December 1976 through March 1977, and submits graphs of temperature readings at Fairmont, Virginia for December through February.

The record in this proceeding and the general knowledge of the extreme and unusual weather conditions and shortages of energy support the approval of the petitioners' proposal to waive portions of the arbitrary demurrage charge. If other carriers, which are party to the specified

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[2] Under the Commission's credit regulations the applicable charge must be paid promptly within a specified period and there is no justification for waiving that requirement.

tariff, desire to participate in the proposal, they will be permitted to do so upon notifying the Commission in writing of their intent. The extension of the proposal to demurrage charges not named in the involved tariff or in an amount greater than that specified has not been substantiated. However, the approval of the instant proposal does not prejudice the filing of such proposals by the carrier or the filing of additional claims for greater relief by the shippers.[3] Furthermore, shippers or receivers will have the option of applying for the claim under the involved proposal, filing a claim under the proposal and in the event no binding settlement is made subsequently seeking relief from alleged unjust and unreasonable demurrage charges under the Commission's regular procedures, or by initially seeking relief from the Commission under its regular procedures.[4] Therefore, it is not unreasonable to require claims under the proposal to be filed with the carrier within a specific period of time. The time period in which claims should be filed is fixed at 90 days after date of publication in the Federal Register, of notice of this permissive order.

Certain modifications in the proposal are necessary, however, to insure that false claims will not be filed by shippers

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[3] The waiver or reparation of the penalty portion of demurrage charges has been approved when neither the carrier nor shipper is at fault. *Ford Motor Co.* v. *Chesapeake & O. R. Co.*, 311 I.C.C. 559 (1960); *Kalmbach-Burkett Co., Inc.* v. *Illinois Central R. Co.*, 289 I.C.C. 532 (1953); and *Myers, Myers & Goen* v. *Chicago, R. I. & P. Ry. Co.*, 259 I.C.C. 51 (1944). The shipper, however, is required to make efforts if possible, to minimize the detention of the cars. Waiver of all of the applicable demurrage charges (including the compensatory portion), is generally not approved.

[4] Shippers and receivers are encouraged to file claims initially with the carrier. The procedures adopted and standards applied for settlement under the claim procedures will be strictly voluntary and will not bind individual shippers who either do not qualify for settlement thereunder or do not invoke the claim procedures under the proposal.

or receivers and that there will be no potentially discriminatory treatment by the carriers. Shipper or receivers will therefore be required to verify the justification statement and to indicate briefly therein, what efforts were taken to minimize the delay in the release of the cars subject to the claim. The period of severe weather and fuel shortages will also be limited to the period of December 28, 1976 through March 15, 1977, to eliminate the filing of claims for demurrage charges not caused by the emergency conditions.[5] Copies of claims granted or denied under the proposal are to be filed by the carrier with the Commission, and on the rejected claims, an explanatory note as to the reason for the denial should be given.[6] Certain other clarifying modification in the proposal have also been made to avoid ambiguity, as set forth in Appendix B.

Approval of each of the filed claims will not be given by the Commission as suggested by petitioners since it would not be practical to verify each claim. However, the filing requirements ordered herein and the modifications in the proposal will minimize the possibilities of discriminatory or arbitrary treatment. Shippers and receivers are also encouraged to report to the Commission any discriminatory application of the proposal by the carriers.

It is ordered, That the carriers listed [in] Appendix A be, and they are hereby, authorized to adjust demurrage charges which accrued on cars held during the period specified to $10 or $15 a day, as set forth in Appendix B; that other carriers participating in the involved tariff, 4-J,

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[5] The period will encompass the full period of extreme weather and energy shortages which occurred last winter, as noted in our order served April 18, 1977, in *Request for Certain Railroads for Authority to Waive Demurrage Charges.*

[6] The carrier is only required to indicate briefly its reasons for denying the claim, for example, insufficient information, demurrage accrued outside the emergency period, etc.

I.C.C. H-59, upon notifying the Commission in writing of their intent to do so, may also participate in the modified proposal.

And it is further ordered, That the above-referred to carriers shall promptly file with the Commission copies of the claims upon which adjustments were made under authority of this order and those which were denied, with a brief explanation as to the reason for the denial.

By the Commission, Division 2, Commissioners Hardin, Murphy, and Clapp.

H. G. Homme, Jr.
Acting Secretary

(Seal)

Appendix A

PARTICIPATING CARRIERS

Aliquippa and Southern Railroad Company
Bessemer and Lake Erie Railroad Company
Chessie System
Consolidated Rail Corporation
Cuyahoga Valley Railway Company
Delaware and Hudson Railway Company
Detroit, Toledo and Ironton Railroad Company
Elgin, Joilet and Eastern Railway Company
Family Lines System [1]
Grand Trunk Western Railroad
Indiana Harbor Belt Railroad Company
Manufacturers' Junction Railway Company
Monongahela Connecting Railroad Company
Norfolk and Western Railway Company
Richmond, Fredericksburg and Potomac Railroad Company
Southern Railway System
Union Railroad Company

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[1] The Family Lines include the Atlanta and West Point Railroad Company, Clinchfield Railroad Company, Durham and Southern Railway Company, Gainesville Midland Railroad Company, Georgia Railroad, Louisville Railroad, Seaboard Coast Line Railroad, and The Western Railway of Alabama.

Appendix B

APPROVED PROPOSAL

1. Only those shippers and receivers directly affected by the weather disability or fuel shortage during the period of December 28, 1976 through March 15, 1977, can claim demurrage relief; (See Note).

2. Each shipper or receiver must pay his demurrage as rendered and then file for reclaim;

3. Each shipper or receiver must file individual verified claims at each location supported by justification, i.e., dates of detention, reasons therefore [*sic*] and whether efforts were made to minimize the delay;

4. The relief requested due to this emergency will be limited to demurrage applicable, in accordance with Freight Tariff 4-J, J. F. Doyle, Agent, I.C.C. H-59;

5. Adjustments for demurrage subject to other than the above-specified tariff will be handled separately, i.e., unit trains, volume shipments, coal, etc.;

6. With respect to the above-specified tariff, after the expiration of free time and the four $10 debit days, the demurrage charge of $20 will be reduced to $10 per day and the demurrage charge of $30 will be reduced to $15 per day thereafter;

7. Fuel shortage relief will be applicable as follows: allowance will be given for any cars on hand at the time such interference began or on inbound cars on which forwarding directions were given within 3 days after the beginning of such interference;

8. Claims under this proposal must be filed with the carrier within 90 days after publication of notice of this permissive order in the Federal Register.

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NOTE: Shippers and receivers can elect to file a claim under this proposal or a formal docket with the Interstate Commerce Commission. The filing of a claim under this proposal also does not prevent the shipper from seeking additional relief from the Commission. In addition, special-docket applications can be filed by the carrier.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

No. 36918

MONONGAHELA POWER COMPANY

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY

Decided October 27, 1978

Complainant alleges that the demurrage charges on coal cars detained at its Harrison and Willow Island, WV, power stations from December 29, 1976, through March 5, 1977, were unlawful. In the alternative, it seeks to recover the penalty portion of these charges, computed as $582,570 less the sum of the basic per diem charge plus a 20 percent allowance for administrative expenses. An award of interest is not requested.

The winter of 1977 was perhaps the most severe in this century. Extreme weather conditions prevailed in the vicinity of complainant's power stations from December of 1976 until late March of 1977. The coal in the cars arriving at complainant's facilities during this period was frozen on arrival, and the lading had to be thawed before the cars could be unloaded. The situation was particularly severe at the Harrison Station.

At the Harrison station, cars are usually unloaded by securing them to a mechanical dumper which will turn the car upside down. Under normal conditions, 140 to 150 coal cars can be unloaded each day. By mid-December of 1976, the cars retained from 5 to 50 percent of their frozen loads after initial use of the dumper. Under Rules 14 and 27 of

the Uniform Freight Classification, rail cars must be completely unloaded before then [*sic*] can be released from the consignee to the carrier. Normal and extraordinary measures taken by complainant proved insufficient to clean the cars expeditiously so as to avoid demurrage. Freeze-proofing of coal by suppliers with oil and salt products had no noticeable effect. Overtime and additional personnel to scrape the car sides and break up the frozen chunks between uses of the dumping machine did not solve the problem. Air hammers were used in an attempt to break up the frozen masses.

Despite these measures, the coal was so congealed that no cars could be unloaded between December 25 and January 10. During January, the situation was most critical. Approximately 1200 cars were backed up waiting to be unloaded. All inbound movements were halted on December 29 and were not resumed until the first week of March. In late January, complainant was able to locate a contractor to operate a portable steam generator to thaw the coal loads. The average unloading time per car increased from about 3 minutes to between 15 and 60 minutes, depending on the condition of the load. Complainant unloaded 495 cars in January, 635 in February, and 158 in the first week of March.

At Willow Island, two cars of coal were received on January 14, 1977, with the lading frozen. These had been shipped on September 8, 1976. The cars were released on January 23, 1977. A third car was forwarded on January 4 and was also placed for unloading on January 14; this car was released with the other two on January 23.

In No. 36574, *Petition of Railroads Seeking Authorization to Waive Demurrage Charges Caused by Severe Winter Weather*, decided August 3, 1977 (not printed), the Commission authorized certain railroads (including defendant) to waive part of the demurrage charges incurred during the severe winter weather experienced between December 28,

1976, and March 15, 1977. Pursuant to this order, complainant applied to defendant for relief from the charges which had accrued on cars at its Harrision power station. Complainant asserts that it reserved the right to seek other and additional relief. It requested and received in settlement from defendant $521,500, which represented the difference between the applicable charges ($1,104,010) and the reduced basis approved in No. 36574 ($582,510). No claim was made on the cars detained at Willow Island.

Conclusions and Findings

In our opinion, as to the cars at the Harrison station, since complainant has settled its claim with defendant under the procedures adopted in No. 36574, *supra,* it is estopped from seeking further relief from the Commission. At sheet 3 of the order, the options available to aggrieved parties were stated, as follows:

> shippers or receivers will have the option of applying for the claim under the involved proposal, *filing a claim under the proposal and in the event no binding settlement is made subsequently seeking relief from the alleged unjust and unreasonable demurrage charges under the Commission's regular procedures,* or by initially seeking relief from the Commission under its regular procedures. * * * * (Emphasis supplied).

Clearly, the order thus excluded the possibility of obtaining relief under the special procedures and then seeking additional reparations through a complaint to the Commission. Complainant has voluntarily [1] elected its remedy and cannot be heard further to complain on the same cars and on the same days for which it has already been compensated

[1] The procedures under No. 36574 are completely voluntary to the shipper and permissive to the carrier as discussed in No. 36899, *General Motors Corporation* v. *Southern Railway Company,* decided by this Board concurrently herewith.

by the railroad. This constituted a binding settlement, since relief was accorded to the maximum extent permitted by No. 36574, *supra*. That relief may have been permitted on the formal docket in addition to blanket relief under an order in 1951 is not shown to be apposite here, since complainant has not demonstrated that the 1951 order contained similar provisions to No. 36574. The question is not whether blanket relief and subsequent additional reparations are mutually exclusive, per se, but whether the order in No. 36574 prohibits the granting of additional reparations. Finally, the reference to the "NOTE" in Appendix B to No. 36574 must be considered. It states:

> Shippers and receivers can elect to file a claim under this proposal or a formal docket with the Interstate Commerce Commission. The filing of a claim under this proposal also does not prevent the shipper from seeking additional relief from the Commission. In addition, special-docket applications can be filed by the carrier.

Complainant relies on the second sentence as authority for its seeking further reparations here. We believe that its reliance on this sentence out of context is misplaced. The additional relief contemplated can only refer back to the three options detailed at sheet 3 of the order, specifically to the situation where no binding settlement was reached for certain car-days. The first sentence of the "NOTE" indicates that claims could be made under the special procedures or the Commission's regular procedures, but not both, and the second sentence merely modifies that to account for the contingency of a claim under the special procedures, being denied. There is no inconsistency.

As to the shipments to Willow Island, no claim had been prosecuted under the special procedures. Consequently the formal complaint is not barred. We need not consider the proximate cause of the detention, since the complainant has not shown that it exercised due diligence in releasing or

attempting to release the cars. In *Prince Manufacturing Co.* v. *Norfolk and Western,* 356 I.C.C. 702, 707 (1978), the Commission found that "some evidence that complainant made special efforts to avoid or abate the accrual of demurrage is required." Although counsel argues that complainant instituted certain measures beyond normal attempts to unload, this is uncorroborated by the testimony of any operating witnesses. In the absence of *any* evidence on this element of complainant's case, we conclude that the complaint as to these three cars must be dismissed.

We find:

As to shipments to the Harrison power station, the complaint is barred by the prior binding settlement between the parties. As to shipments to the Willow Island power station, complainant has failed to establish that it exercised due diligence. This decision does not significantly affect the quality of the human environment.

It is ordered:

The complaint is dismissed.

By the Commission, Review Board Number 4, Members FitzPatrick, Shaw, and Fisher.

H. G. Homme, Jr.
Acting Secretary

(Seal)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

DECISION

No. 36918

MONONGAHELA POWER COMPANY

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY

Decided: August 21, 1979

On November 17, 1978, complainant Monongahela Power Company filed an administrative appeal of the initial decision of Review Board Number 4, served November 7, 1978. The defendant, The Baltimore and Ohio Railroad Company filed a reply. Complainant on December 26, 1978, filed a motion to strike a portion of defendant's reply to the administrative appeal or, in the alternative, to reopen the record. Defendant filed a reply on July 16, 1979 to complainant's motion.

By complaint filed May 23, 1978, Monongahela alleged that the demurrage charges on coal cars detained at its Harrison and Willow Island, WV, power stations from December 26, 1976, through March 5, 1977, were unlawful. In the alternative, it sought to recover the penalty portion of these charges, computed as $582,570 less the sum of the basic per diem charge plus a 20 percent allowance for administrative expenses. It did not seek an award of interest.

The Board's rationale differed for the Harrison and Willow Island movements. With respect to the Harrison movement, it held that the complainant was estopped from seeking further relief from the Commission since it had settled its claim under the procedures adopted in No. 36574, *Peti-*

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tion of Railroads Seeking Authorization To Waive Demurrage Charges Caused by Severe Winter Weather, decided August 3, 1977 (not printed). The Commission there authorized certain railroads (including defendant) to waive part of the demurrage charges incurred during the severe winter weather experienced between December 28, 1976, and March 15, 1977. Pursuant to this order, complainant requested and received in settlement from defendant $521,500, which represented the difference between the applicable charges ($1,104,010) and the reduced basis approved in No. 36574 ($582,510).

The Review Board held, and we are in agreement, that No. 36574 excludes the possibility of first obtaining relief under its special expedited procedures and then seeking additional reparations through a complaint to the Commission. Complainant elected its remedy, which constituted a binding settlement since relief was accorded to the maximum extent permitted by No. 36574. This also precludes complainant's claim for an award of interest in this proceeding.

With respect to the Willow Island power station, since no claim was prosecuted under the special procedures, the Board found the complaint was not formally barred. However, complainant failed to present any evidence here that it exercised due diligence in releasing or attempting to release the cars as required by *Prince Manufacturing Co.* v. *Norfolk and Western,* 356 I.C.C. 702, 707 (1978). We therefore conclude that the appeal as to these remaining three cars must be dismissed.

Defendant has raised, as an additional ground for denial of the appeal, the existence of an average demurrage agreement [1] which it contends would necessarily bar the relief

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[1] Without an agreement, demurrage accrues on each car held after expiration of a period of free time even if other cars are released early. If a shipper enters into an average demurrage

sought. Complainant filed a motion to strike this portion of the appeal or, in the alternative, to reopen the record to receive additional evidence as to the effect of the average demurrage agreement. B&O fully opposes the motion. In view of our decision on the various other points, we need not consider these arguments. To do so or to reopen the record would serve no useful purpose since complainant could not prevail under any circumstance even if we were to adopt the view of the average demurrage agreement most favorable to it.

We find:

The evidence does not warrant a result different from that reached by Review Board Number 4. The statement of facts, the conclusions, and the findings of Review Board Number 4 are proper and correct in all material respects and are affirmed and adopted as our own. This decision does not significantly affect the quality of the human environment and does not call for preparation of a statement of Environmental Impact.

It is ordered:

The complaint is dismissed.

By the Commission, Division 2, Commissioners Stafford, O'Neal and Christian.

/s/ AGATHA L. MERGENOVICH
Agatha L. Mergenovich
Secretary

(SEAL)

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agreement, cars released before free time expires earn credits which are offset against debits for cars detained. Demurrage is then computed under an agreed to formula on a periodic basis.